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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 951

SEANOR COAL COMPANY, a corporation, *Petitioner,*

v.

JOHN L. LEWIS, HENRY G. SCHMIDT AND JOSEPHINE ROCHE, as Trustees of the United Mine Workers of America Welfare and Retirement Fund of 1950, *Respondents.*

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF OF RESPONDENTS IN OPPOSITION

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BRIEF OF RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The Opinions below are correctly set forth in the Petition.

JURIISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

STATUTES INVOLVED

The Statutes involved are adequately set forth in the Petition.

COUNTERSTATEMENT OF QUESTIONS PRESENTED

The Respondents do not accept the Statement of Questions Presented as set forth in the Petition (p. 2).

In lieu thereof, Respondents submit the following:

I

May a trust agreement creating an employees' welfare trust pursuant to Section 302(c)(5), Labor Management Relations Act, 1947, contained in a *written* collective bargaining agreement, and which requires the employer to pay to the Fund a royalty of forty cents (40¢) per ton, be thereafter *orally modified,* so as to absolve the employer from its obligation to make payments to the trust, unless the vague and indefinite promise of an increase in the productivity per employee was achieved, sufficient to enable the employer to meet its contractual obligations?

II

Does a finding by the National Labor Relations Board that a Section 302(c)(5) trust agreement provision, which created an employer's obligation to pay eighty cents (80¢) to the welfare trust for each ton of coal purchased from a non-signatory, or non-royalty paying producer, is violative of Section 8(e)'s "hot cargo" clause, totally invalidate the other, severable provisions of the trust agreement, including the separate and distinct provision creating the employer's obligation to pay to the trust a royalty of forty cents (40¢) per ton on all coal produced by its employees.

COUNTERSTATEMENT OF THE CASE

The Petition correctly sets forth the material facts and proceedings, except that: (1) petitioner's statement that its "operations were again terminated on or about June 30, 1965 and have not been resumed"

(Pet. 9) has no record support; and (2) petitioner's inference that the oral modification defense was raised by its responsive pleadings is erroneous. The oral modification defense was first raised, and the defense of equitable estoppel abandoned, in petitioner's arguments in opposition to summary judgment in the District Court (Pet. App. 23).

REASONS FOR NOT GRANTING THE WRIT

I. THERE ARE NO SUBSTANTIAL FEDERAL QUESTIONS PRESENTED.

A. The Lower Courts, Interpreting Congressional Intent in Enacting Section 302(c)(5), Correctly Rejected an Oral Modification of a Written Trust Agreement Created Pursuant to That Statute.

An employer's requirement to pay a royalty of forty cents (40¢) per ton on all coal produced for use or sale was orally modified to require the royalty payment only if "the productivity per employee would increase sufficiently to enable the Defendant to meet its obligations [to pay the royalty] under the labor contract" (Pet. App. 40).[1] The Third Circuit declared this oral modification "ineffective".

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[1] In moving for summary judgment, the union representative's authority to modify the terms of the trust agreement, and the fact of the modification, were necessarily admitted, but solely for purposes of summary judgment.

In both lower courts it has been consistently denied that the modification was enforceable, whether oral or written. The modification lacks the required definiteness and certainty, and is "so lacking in precision, so indefinite and vague, that nothing certain about it can be formulated." *Seiss* v. *McClintic Marshall Corp.*, (Sp. Ct. Pa., 1936) 324 Pa. 201; *Zukoski* v. *Baltimore and Ohio Railroad Company*, (C.A. 3, 1963) 315 F. 2d 622, cert. den. 375 U.S. 856. The Third Circuit agreed, observing the modification "might well be declared ineffective" on this ground alone, but decided the issue on the "more fundamental objection", that the modification was violative of Section 302(c)(5) (Pet. App. 41).

Relying on the legislative history of Section 302(c)(5), and decisions of this Court interpreting Congressional intent, the Third Circuit concluded that the concern of Congress was "over corruption of union officials and coercion of employers, to the detriment of honest bargaining relationships" (Pet. App. 42), and the protection of the interests of employee beneficiaries of 302(c)(5) trusts, required that both the employer's agreement to pay to the trust and the basis of trustees' payment from the trust to the employees, must be reduced to writing (Pet. App. 44).

The cogent, reasoned opinion of the Third Circuit, concludes the Congressional purpose in enacting Section 302(c)(5) was to insure that employees were safeguarded, both in the creation and the administration of welfare trusts. The Third Circuit determined that while the specific language of the statute was perhaps ambiguous, to carry out Congressional intent it is not necessary to "determine the meaning of [the statute] by a microscopic study of its language", and that its conclusion was in harmony with this Court's recent admonition that "the federal courts [have the duty] to fashion a body of federal common law for the enforcement of collective bargaining agreements" (Pet. App. 43). The Court then said (Pet. App. 43-44):

> It would be, at the least, incomplete to require for the benefit of the employees and to prevent collusive or fraudulent side arrangements between employers and union representatives that the benefits which the employees are to receive from union welfare funds shall be specified in a written agreement with the employer and yet to permit the written foundation on which the welfare fund rests, in this case calling for the amount of the royalties payable

> on coal mined, to be the subject of oral modifications.

And further, that any other interpretation (Pet. App. 44):

> * * * would expose employer and union representatives alike to the temptations of corrupt bargains, for it would permit the union to extract from an employer a secret promise to pay some other amount into the Fund without requiring such payments to become a matter of record and thus would frustrate the purpose of § 302(c)(5).

The Third Circuit's opinion is consistent with the conclusion of Chief Justice Hughes, who said in *Sorrells* v. *United States,* (1932) 287 U.S. 435, 446-447, 77 L. ed. 413, 419:

> Literal interpretation of statutes at the expense of the reason of the law and producing absurd consequences or flagrant injustice has frequently been condemned.

Plainly, "[t]he reason of the law in such cases should prevail over its letter." *United States* v. *Kirby,* (1868) 7 Wall. 482, 487, 19 L. ed 278, 280. The patent legislative purpose, namely, to protect employees from the possible corrupt employer-union agreements, must "prevail over [the possible ambiguity in the] letter" of Sections 302(c)(5)(A) and (B). The Third Circuit concluded, in rejecting the oral modification that (Pet. App. 45):

> Whatever ambiguity lurks in the [statutory language] does not justify a conclusion that the provision for payment contained in the written collective bargaining agreement may be removed by oral arrangement. On the contrary, it would take clear and unambiguous language to prescribe that

> in order to fall within the exceptions to the criminal sanctions of § 302 only the detailed basis for the payments by the welfare fund to the employees but not the payments by the employer into the fund must be specified in the written agreement with the employer.

To permit that portion of a 302(c)(5) trust agreement requiring an employer's payment, which has been decided by this Court to be "really another form of compensation to the employees", *Lewis* v. *Benedict Coal Corp.*, (1960) 361 U.S. 459, 469, 4 L. ed 2d 442, 449, to be oral, or if in writing, subsequently modified orally, would permit under the table, covert agreements, unknown to the employees or the trustees. The very employee benefits Congress was seeking to protect would be jeopardized.

B. Petitioner's Contentions, Raised in an Effort To Create a Substantial Federal Question, Have No Basis in Fact.

In an effort to present a federal question petitioner urges: (1) that if the Third Circuit's decision is not overruled "literally thousands of existing agreements" would be invalidated (Pet. 15); and (2) that there is "[e]vidence of a conflict in the Circuits on this question" (Pet. 17). Neither contention has basis in fact.

(1) Petitioner's argument that the Third Circuit's decision, "would render invalid and violative of law literally thousands of existing [302(c)(5) trust] agreements" (Pet. 15), is based solely upon a Bureau of National Affairs publication,[2] by some unnamed author or authors, in which Section 302(c)(5) trusts are not specifically discussed or identified, and the question of

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[2] Collective Bargaining Negotiations and Contracts, The Bureau of National Affairs, Inc., (1963) pp. 44:301 et seq.

enforceable oral trust agreements, or of the oral modification of a written trust agreement, is not even considered.

Based solely on this publication, which has no efficacy here, petitioner argues that while "[i]t is reasonable to believe that Congress was aware" of the increasing trend toward employee welfare funds, that "it is equally unreasonable to believe that they desired the Courts to stretch and twist Section 302" to control management and union operation in this area (Pet. 16). This argument must be dismissed as diametrically opposite to announced purpose of Section 302(c)(5). The enactment of Section 302(c)(5) reflects that the express Congressional purpose was to prevent management and union corruption to the detriment of the employees involved, which potential is patently possible if the employer's trust obligation may be created or modified orally. The Third Circuit, citing this Court's *Arroyo* v. *United States,* (1959) 359 U.S. 419, 3 L. ed 2d 915, and *United States* v. *Ryan,* (1956) 350 U.S. 299, 100 L. ed 335 held: "This provision was written into the statute because of the special concern of Congress over the welfare fund of the United Mine Workers of America", and that "[i]t was a part of the larger congressional concern over corruption of union officials and coercion of employers, to the detriment of honest bargaining relationships" (Pet. App. 41-42).

(2) Petitioner's second argument of "evidence of a conflict in the Circuits on this question" (Pet. 17) is equally devoid of factual basis.

No Circuit Court has decided that any portion of a 302(c)(5) trust agreement could be oral. The Third,

Fifth, Seventh and Eighth Circuits have considered the question of an employer's obligation to make payments to a welfare fund created under Section 302(c)(5), and have recognized that to comply with the section, the employer's agreement must be reduced to writing. *Employing Plasterers' Asso'n* v. *Journeymen, etc.* (C.A. 7, 1960) 279 F. 2d 92; *Blassie* v. *Kroger Company* (C.A. 8, 1965) 345 F. 2d 58; *Wagor* v. *Cal Kovens Construction Corporation* (C.A. 5, 1967) 382 F. 2d 813; *Lewis* v. *Seanor Coal Company* (C.A. 3, 1967) 382 F. 2d 437.

The two most recent District Court decisions set forth with clarity the Congressional intent and the consistent judicial interpretation of that intent. *Moglia* v. *Geoghegan* (D.C. N.Y., 1967) 267 F. Supp. 641; *Garment Workers, Local 509 (ILGW)* v. *Annshire Garment Co., Inc.* (D.C. Kansas, 1967) 55 L.C. 19,408. In *Moglia* the court said (pp. 646-647):

> The background of this law and the cases interpreting it, leave no doubt that, if there is one essential element without which these funds cannot lawfully exist, it is that there be a written agreement specifying the source and amounts of money to be paid into and to be disbursed from the Fund.

The Third, Fourth and Sixth Circuits have considered the question of prior or contemporaneous oral agreements, modifying the terms of a 302(c)(5) trust, contained in a collective bargaining agreement which was reduced to writing. *Lewis* v. *Lowry* (C.A. 4, 1962) 295 F. 2d 197, cert. den. 7 L. ed. 2d 438; *Lewis* v. *Lowry* (C.A. 4, 1963) 322 F. 2d 453; *Lewis* v. *Mears* (C.A. 3, 1962) 297 F. 2d 101, cert. den. 369 U.S. 873; *Lewis* v. *Owens* (C.A. 6, 1964) 338 F. 2d 740. In each

case the majority did not feel it necessary to reach the national labor policy question, preferring to decide the issue on the basis of standard contract law. However, in each case, a dissent, or a concurrence, would have based the decision on national labor policy. Chief Judge Sobeloff, dissenting in *Lewis* v. *Lowry* (C.A. 4, 1962) 295 F. 2d 197, said (p. 201):

> Literally read, section 302(c)(5)(B) may be thought to require that only the terms of the payments to the employees be in writing. Nevertheless, the protection of the employees is not complete unless the statute is read to require as well that the terms on which payments are to be made into the Trust Fund be similarly stated in writing. Congress could not have intended to safeguard against the improper use of money once it has been contributed to the fund, but not against evasion of the primary obligation to contribute.
>
> * * * *
>
> The royalty payments are an indirect method of compensating the employees, and they have a right to know exactly what they are receiving for their services. They also have a right to know how well their union negotiators represented their interests. They are being deceived if the publicly declared, written agreement may be sapped by a secret compact.

Chief Judge Biggs, joined by Judges Staley, Ganey and Smith, dissenting in *Lewis* v. *Mears,* supra, would have followed Chief Judge Sobeloff's dissent in *Lowry.* Judge Phillips, concurring in the result in *Lewis* v. *Owens,* supra, would have preferred the dissent of Chief Judge Sobeloff in *Lowry* over the majority there, and would have decided *Owens* on the basis of national labor policy.

Petitioner cites *Auten v. Local 11, IBEW* (D.C. S.D. Cal., 1965) 51 L. C. 19,552, 58 LRRM 2531, which cited *Bey* v. *Muldoon* (D.C. E.D. Pa., 1963) 223 F. Supp. 489, to support the claimed "evidence of a conflict in the Circuits" (Pet. 17). Petitioner's contention that the Circuit Court's decision here "would appear to overrule" (Pet. 17) the prior per curiam affirmance of *Bey* v. *Muldoon* (C.A. 3, 1966) 354 F. 2d 1005, must be rejected. The Third Circuit's affirmance of *Bey,* affirms only the issue, not contested here, that the plan of payment of trust benefits to the employees must be in writing. In *Auten,* as in *Bey,* the court was not ruling on the requirement that the employer's obligation to pay to the trust be in writing, and these decisions cannot be said to be in conflict with the decision here.

C. Section 8(e)'s Invalidation of a Severable Contract Clause Does Not Invalidate the Remainder of the Contract, to Which All Parties Conformed Their Conduct, and Under Which the Employees Labored.

Petitioner's second question urges the writ should be granted because of the Third Circuit's rejection of its claim that the National Labor Relations Board's invalidation of one, severable provision of the trust agreement, as violative of Section 8(e), Labor Management Relations Act, 1947, renders invalid the entire royalty provisions of the trust agreement.[3] Petitioner's contention must be denied.

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[3] Petitioner urges the validity of the trust agreement should have been decided by "a full hearing" in the District Court. This plea ignores the fact that at the time of consideration and decision by the District Court and argument in the Third Circuit, the National Labor Relations Board had under active consideration the question of the validity of the eighty cents (80¢) royalty under "hot cargo" provision of Section 8(e) (165 NLRB No. 49, June 16, 1967). The Board's decision is at present on appeal to the District of Columbia Circuit, No. 21,129 and No. 21,226.

Here, trustees of the 302(c)(5) trust sued a signatory employer to recover royalties due the trust under the severable clause in the trust agreement, which required the employer to pay to the fund a royalty of forty cents (40¢) per ton on each ton of coal produced. The Third Circuit held that the Board's Section 8(e) determination, invalidating the eighty cents (80¢) royalty provision, could have no effect on the separate forty cents (40¢) royalty claim, which is the sole basis of trustees' action. As the Third Circuit correctly observed, the Board "limited its inquiry to the effect [of the 80¢ clause] under § 8(e)", holding (Pet. App. 37-38):

> * * * the Board has not decided or even cast any doubt on the validity of the basic royalty provision of forty cents per ton * * *. The basic provision of forty cents royalty per ton for coal produced by the employer is radically different from the special provision requiring an eighty cents royalty on coal acquired from outside nonsignatory operators and standing alone is beyond the range of § 8(e).

The Third Circuit's enforcement of the separate forty cent (40¢) royalty provision of the trust agreement is consonant with Section 8(e)'s provision that a finding of invalidity of one clause in a collective bargaining agreement, invalidated the agreement only to the extent of the tainted clause, and did not invali-

date the entire agreement.[4] Interpreting Section 8(e), the Court determined (Pet. App. 38-39):

> Section 8(e) does not invalidate an entire collective bargaining agreement because it contains a "hot cargo" provision; the statute merely makes a contract with such a provision unenforceable and void to the extent that it contains the "hot cargo" provision.

This Court's *Lewis* v. *Benedict Coal Corp.*, (1960) 361 U.S. 459, 469, 4 L. ed 2d 442, 449, holds the forty cent (40¢) royalty payments "are really another form of compensation to the employees". In *NLRB* v. *Rockaway News Supply Company* (1953) 345 U.S. 71, 97 L. ed 832, the Court refused to invalidate a contract, *ab initio,* covering the period during which the parties operated under its terms, believing it to be valid, and no authority having held it invalid. The *Rockaway* determination that "The total obliteration of this contract is not in obedience to any command of the statute" (p. 838); is equally applicable here and requires enforcement of the forty cent (40¢) provision of the contract, earned by the employees upon the production of coal. This contention is consistent with the decision in *Lewis* v. *Pennington* (C.A. 6, 1963) 325 F. 2d 804, cert. den. (1965) 381 U.S. 949, 14 L. ed 2d 723.

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[4] Section 8(e) It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement *shall be to such extent unenforceable and void.* (Emphasis supplied.)

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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